

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
REPLY BRIEF**

NO.

77-6015

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

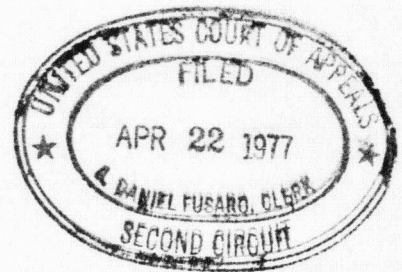
GEORGE WHITE, on behalf of)
himself and all others)
similarly situated,)

Plaintiff-Appellee,)

V.)

DAVID MATHEWS, Secretary of)
the Department of Health,)
Education and Welfare, as an)
individual and in his)
official capacity,)

Defendant-Appellant)



APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

REPLY BRIEF FOR THE APPELLANT

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Introduction

In this brief, we reply briefly to certain points raised by the plaintiff in his main brief (hereinafter, "P.Br.").

Points In Reply

A. The Initial and Reconsideration Determinations - Evidence.

Despite a contrary assertion by plaintiff (P.Br. 7), the wage earner's "physical being" is fully considered at the initial and reconsideration stages of the determination process. Indeed, his physical condition is a central inquiry in the determination process and is the subject of the medical reports universally utilized at these stages. Moreover, the wage earner's own assessment of his condition, both objective and subjective, may be introduced by written submission at these stages. However, the importance of subjective evidence should not be overemphasized.

As the Court recognized in Eldridge, "the disabled worker must demonstrate by means of 'medically acceptable clinical and laboratory diagnostic techniques'. . . that he is unable 'to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment. . .'" Mathews v. Eldridge, 424 U.S. at 343. As the Court clearly recognized and the Congress emphasized in the 1967 Amendments to the Social Security Act (H.R. No. 544, 90th Cong., 1st Sess. 29-31 (1967)), a medical assessment of the worker's condition is required for purposes of entitlement. 1/

B. The "Java" Case.

Relying upon California Human Resources Dept. v. Java, 402 U.S. 121 (1971), the plaintiff asserts that Java stands for the principle that a chief administrator's approval of a benefit system "means very little" when the evil to be reached is not being attacked and has become a "hollow promise." (P.Br. 17.) If Java can be said to stand for this proposition, 2/ the proposition

1/ Parenthetically, it may be observed that the hearing here did not result in a favorable decision despite plaintiff's testimony and the receipt of additional medical evidence (Appendix, 55a-56a). The reversal came at the Appeals Council stage after further evidence was submitted. Appendix, 56a. This illustration of the "open file" concept of adjudication emphasizes the Court's caution in Mathews v. Eldridge, supra at 346-47, regarding the hearing's impact upon the "reversal" rate at the hearing level.

2/ The Secretary of Labor had certified that the State Unemployment scheme complied with applicable Federal requirements, a fact recited in the opinion, but ignored in analysis.

has apparently been modified by Eldridge's reference to the substantial weight to be accorded the administrator's judgments. Mathews v. Eldridge, supra at 349. 3/ However, it should be remembered that in Java the Secretary of Labor faced a somewhat limited range of options in certifying the state plan. If the plan failed to meet federal requirements, his option was, we assume, to withhold matching funds. Faced with this choice, which would have totally frustrated the Federal scheme, a certification, albeit grudging, may have followed. The Court is certainly sufficiently sophisticated to reach this conclusion and might, therefore, accord less weight to the Secretary of Labor's conclusion, if, in fact, it gave any consideration to this point and plaintiff's proposition.

C. The APA's Doubtful Application.

Although the plaintiff asserts that the Administrative Procedure Act has application to the Social Security hearing process, the Supreme Court's recent decision in Califano v. Sanders, ___ U.S. ___, 97 S.Ct. 980 (1977) leads to a contrary conclusion. In view of the Court's holding the APA does not contain an independent grant of subject matter jurisdiction, the Court has implicitly recognized that the APA will not provide

3/ Plaintiff does not, in our reading of brief, urge that Java has application to this action beyond th's limited proposition. A broader application would clearly be difficult given the statutory 5 month waiting period for disability benefits (42 U.S.C. §423(a)(1)) and the Secretary's authority to withhold benefit payments where review is sought (42 U.S.C. §405(i)).

legally enforceable rights where discretionary acts of an agency are complained of and review is precluded or limited by other jurisdictional provisions. Since 42 U.S.C. §405(g) and (h) respectively operate, as we suggested in our opening brief, to limit review to final decisions of the Secretary made after a hearing and to preclude resort to other sources of jurisdiction when statutory questions are presented, no legally enforceable right to compel agency action unreasonably delayed could exist under the APA if it were assumed that that Act had application to the Social Security Act. Given the limited remedy available under 42 U.S.C. §405(g), it consequently follows that Congress did not intend the APA to apply to the Social Security hearing process.

D. The Eldridge Decision

The plaintiff urges at length (P.Br., 34-64) that the Court's decision in Mathews v. Eldridge, supra, is not dispositive of the issue raised here. The plaintiff, however, ignores the obvious fact that the interests that he asserts in support of his thesis are effectively the same interests considered and rejected in Eldridge.

The plaintiff's "substantial deprivation" arguments, i.e., need, economic hardship, and irreparable harm, were clearly rejected. Mathews v. Eldridge, supra. at 341-343. The assertions regarding a "significant risk of error" were similarly rejected. Mathews v. Eldridge, supra at 346-347. As suggested, infra, the significance of face-to-face confrontation with the decision-maker and of subjective evidence was rejected as a decisive factor in

the disability determination process. Moreover, the interest in benefits that the class asserts here is even less substantial than the interest in "uninterrupted receipt" of benefits found to be the sole interest at stake in Eldridge. Mathews v. Eldridge, supra at 340.

The weights to be accorded the interests asserted here are no different in kind or degree from those asserted in Eldridge. The hearing and the speed with which it comes are significant only as an opportunity to correct error. If the possibility of error, the degree of hardship, the interest at stake, and the efficacy of a hearing did not compel a pretermination hearing, they can hardly be thought to compel an acceleration of a hearing which the Court clearly recognized would be delayed many months.

E. Section 205(g) Jurisdiction.

Admittedly, certain parallels exist between the Eldridge case and the instant action which superficially suggest that jurisdiction might lie under 42 U.S.C. §405(g). In both actions, the issue raised is a procedural one and is in the Eldridge case collateral to the substantive claim of entitlement and arguably collateral in this action. The parallels are, however, misleading for the limited nature of the exception to the exhaustion requirement of Salfi clearly does not apply in the action.

In Eldridge, the Court notes that

"Salfi identified several conditions which must be satisfied in order to obtain judicial review under §405(g). Of these, the requirement that there be a final decision by the Secretary after a hearing was

regarded as 'central to the requisite grant of subject matter jurisdiction. . . ' Id. at 764. Implicit in Salfi, however, is the principle that this condition consists of two elements, only one of which is purely 'jurisdictional' in the sense that it cannot be 'waived' by the Secretary in a particular case. The waivable element is the requirement that the administrative remedies prescribed by the Secretary be exhausted. The nonwaivable element is the requirement that a claim for benefits shall have been presented to the Secretary. Absent such a claim there can be no 'decision' of any type. And some decision by the Secretary is clearly required by the statute." Mathews v. Eldridge, at 328.

Concluding that Eldridge had satisfied the non-waivable element by challenging the Secretary's determination that disability had ceased during the initial stage of the administrative process, the Court proceeded to the waivable element of §405(g) jurisdiction, the requirement for exhaustion.

Acknowledging that Eldridge had not exhausted his administrative remedies, the Court noted that the determination regarding the finality of a decision ordinarily will rest with the Secretary. However, the Court further noted that

"[C]ases may arise where a claimant's interest in having a particular issue resolved promptly is so great that deference to the agency's judgment is inappropriate. This is such a case.

Eldridge's constitutional challenge is entirely collateral to his substantial claim of entitlement. Moreover, there is a crucial distinction between the nature of the constitutional claim asserted here and that raised in Salfi. A claim to a predeprivation hearing as a matter of constitutional right rests on the proposition that full relief cannot be obtained at a post-deprivation hearing. See Regional Rail Reorganization Act Cases, 419 U.S. 102, 156 (1974). In light of the Court's prior decisions, see, e.g., Goldberg v. Kelly, *supra*; Fuentes v. Shevin, *supra*; Eldridge has raised at least a colorable claim that because of his physical condition and dependency upon the disability benefits, an erroneous termination would damage him in a way not recompensable through retroactive payments. Thus, unlike the situation in Salfi, denying Eldridge's substantive claim 'for other reasons' or upholding it 'under other provisions' at the post-termination stage, 422 U.S. at 762,

would not answer his constitutional challenge." Mathews v. Eldridge, supra at 331-32 (emphasis supplied).

Consequently, the Court recognized that a narrow exception to the Secretary's otherwise absolute discretion regarding finality may exist if the plaintiff raises a colorable constitutional claim which will be irreducibly lost if exhaustion is required. As we indicated, infra, the plaintiff can in light of Eldridge raise no colorable constitutional claim. Consequently, the narrow exception to the Secretary's discretion regarding finality would not apply here.

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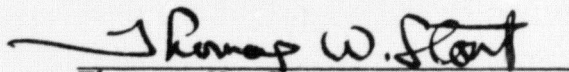
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Certificate of Service

I HEREBY CERTIFY that on this 21st day of April, 1977,
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